

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NORA PULIDO,

Plaintiff,

CIV S-05-0678 FCD JFM PS

v.

UNITRIN, INC., ET AL.,

Defendants.

ORDER AND

FINDINGS AND RECOMMENDATIONS

Defendants' October 20, 2005 motion to dismiss came on regularly for hearing on December 8, 2005. Plaintiff Nora Pulido appeared in propria persona. Peter Meshot made a special appearance for defendants. After hearing from plaintiff and counsel, defendants' motion to dismiss was held in abeyance for sixty days and plaintiff was granted an extension of time to accomplish service of process on the proper defendants to this action. (See December 15, 2005 Order.) On April 13, 2006, this matter was continued for further status conference on May 18, 2006, to allow plaintiff time to retain counsel. Plaintiff Nora Pulido appeared in propria persona. Peter Meshot appeared for defendant Kemper. Joel Velazquez appeared at the hearing, but had not filed a responsive pleading.

Upon review of the motion and the documents in support and opposition, and the entire file of this matter, upon hearing the arguments of plaintiff and counsel and good cause

1 appearing therefor, THE COURT FINDS AS FOLLOWS:

2 Plaintiff has accomplished service of process on Kemper Auto and Home, which
3 filed an answer on February 15, 2006. In light of that answer, Kemper's motion to dismiss will
4 be deemed withdrawn.

5 As noted in this court's December 15, 2005 order, Unitrin, Inc. was not the proper
6 defendant named herein. (Id. at 2.) The insurance company set forth on a document dated July
7 29, 2003 and entitled "Premium Refund," was Unitrin Direct, P.O. Box 9602, Vista, California."
8 (Id. at 2.) Plaintiff has not provided any evidence to the contrary. Accordingly, defendants'
9 motion to dismiss Unitrin, Inc. should be granted.

10 Plaintiff has filed no declaration attesting to service of process on Unitrin Direct
11 Insurance Company. (December 15, 2005 Order at 3.) Pursuant to Federal Rule of Civil
12 Procedure 4(m), the court may dismiss an action where service of summons is not made within
13 120 days after the filing of the complaint. In the order setting status conference, filed April 7,
14 2005, plaintiff was cautioned that this action may be dismissed if service was not timely
15 completed. By order filed December 15, 2005, plaintiff was granted an additional sixty days in
16 which to accomplish service of process on defendants.

17 On February 9, 2006, plaintiff filed a declaration attesting to service of process on
18 Kemper Auto and Home Insurance on February 1, 2006. However, no declaration concerning
19 service of process on defendant Unitrin Direct Insurance Company has been filed. This action
20 was filed April 7, 2005 and plaintiff has not yet served defendant Unitrin Direct Insurance
21 Company with summons, despite the fact that the court provided plaintiff with its registered
22 agent for service of process in the December 15, 2005 order. (See Order at 3.).

23 By this court's December 15, 2005 order, plaintiff was cautioned that failure to
24 timely comply with that order would result in a recommendation that this action be dismissed.
25 Plaintiff has not responded to that order and has apparently made no effort to serve defendant
26 Unitrin Direct Insurance Company with summons. Accordingly, defendant Unitrin Direct

1 Insurance Company should also be dismissed. Fed. R. Civ. P. 4(m).

2 During the April 13, 2006 status conference, plaintiff stated she intended to file a
3 response to the counter claim but requested additional time to retain a lawyer. Mr. Velazquez
4 stated he would be filing a responsive pleading. However, neither plaintiff nor Mr. Velazquez
5 have, to date, filed a counter claim response or responsive pleading, respectively. Service of
6 process was personally accomplished on Mr. Velazquez on March 25, 2006. (See Docket No.
7 34.) Good cause appearing, defendant's April 21, 2006 request for entry of default will be
8 granted. The Clerk of the Court will be directed to enter clerk's default as to Joel Velazquez and
9 plaintiff Pulido.

10 Although plaintiff Pulido stated she had retained an attorney, no attorney has
11 appeared on her behalf or filed a substitution of attorney confirming representation.

12 In light of the above, IT IS HEREBY ORDERED that:

- 13 1. Defendant Kemper's October 20, 2005 amended motion to dismiss is deemed
14 withdrawn;
- 15 2. Defendant's April 21, 2006 request for entry of default is granted;
- 16 3. The Clerk of the Court is directed to enter clerk's default as to Joel Velazquez;
- 17 4. The Clerk of the Court is directed to enter clerk's default as to plaintiff
18 Pulido's failure to reply to the counter-claim; and
- 19 5. The Clerk of the Court is directed to serve a copy of this order on cross-
20 defendant Joel Velazquez, 13 Meadow View Drive, Colusa, California 95932.

21 IT IS HEREBY RECOMMENDED that:

- 22 1. The October 20, 2005 amended motion to dismiss filed by defendant Unitrin,
23 Inc. be granted; and
- 24 2. Defendant Unitrin Direct Insurance Company be dismissed from this action.

25 These findings and recommendations are submitted to the United States District
26 Judge assigned to the case pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten days

1 after being served with these findings and recommendations, any party may file written
2 objections with the court and serve a copy on all parties. Such a document should be captioned
3 "Objections to Findings and Recommendations." The parties are advised that failure to file
4 objections within the specified time may waive the right to appeal the District Court's order.
5 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

6 DATED: May 23, 2006.

7
8 
9 UNITED STATES MAGISTRATE JUDGE

10 001; pulido.4mfr
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26